

Working to Equality: Practical Steps for Designing an Effective Anti-Discrimination Strategy



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Recent events have ignited global public discourse around workplace human rights and, in particular, systemic racial discrimination. Collectively, the deaths of George Floyd, Régis Korchinski-Paquet, and Breonna Taylor have fuelled anti-Black racism protests on a scale unprecedented in scope since the Civil Rights movement of the 1950s and 1960s. Power structures in the political and business worlds are also being examined anew.

The current sociopolitical movement has included an outpouring of statements from corporations and organizations decrying anti-Black racism and committing to the values of diversity and inclusion. This is a commendable response, but statements are merely a first step in the path toward building genuine workplace equality. Employer statements and words alone are not enough: commitment must be translated into practices that actually – and *actively* – reduce racial discrimination within their workplaces.

The Law of Workplace Discrimination

In every Canadian jurisdiction, human rights legislation prohibits employment-related discrimination on the basis of specified personal characteristics (known as “protected grounds”), including race, ethnic origin, colour, and ancestry. Essentially, this means that any differential treatment of employees because of a protected ground is unlawful. One normative goal of human rights law is to encourage employers to facilitate the removal of workplace barriers faced by historically-disadvantaged groups.

Discrimination is commonly thought to consist of overt and malicious acts, such

as racial slurs, the intentional denial of benefits, or acts of targeted violence. Today's turbulent times have underscored, however, that discriminatory acts more often arise in more subtle, nuanced, and insidious forms.

Canadian human rights law can be generally characterized as prohibiting five main forms of discriminatory conduct:

1. **Direct discrimination** – A standard or practice that treats a person or group differently because of a protected ground (e.g. refusing to promote an employee because of their sexual orientation).
2. **Indirect (or “adverse effect / constructive”) discrimination** – A standard or practice that, on its face, appears to be neutral or impose identical treatment, but adversely affects a statutorily-protected group of people (e.g. a policy requiring male employees to be clean-shaven will have an adverse effect on the employment of Sikh men).
3. **Systemic discrimination** – A pattern of attitudes, behaviours, or practices within an organization's social or administrative structures that creates or perpetuates disadvantage for a statutorily-protected group of people (e.g. staffing practices that result in barriers to the advancement or training of racialized employees, which, in turn, results in the underrepresentation of racialized employees in senior management positions).
4. **Harassment** – A course of vexatious conduct or comment relating to a protected ground that is known, or ought reasonably to be known, to be unwelcome (e.g. belittling and mocking an employee who suffers from a disability).
5. **Reprisal** – A negative action, or threat of negative action, that is intended to retaliate against an individual who enforces their human rights.

In the result, the potential for workplace conduct or policies to constitute unlawful discrimination is wide-ranging. Protecting workplace human rights and achieving workplace equality is now more complex and daunting for employers than ever before.

The Unique Challenges of Anti-Black Racism

In recognition of the subtle and nuanced ways in which discrimination can manifest itself, courts and tribunals across Canada have expressly acknowledged how race – and, in particular, racism against Black individuals – has become a factor influencing day-to-day social interactions.

In Canada, the legal recognition of anti-Black racism and its dangers dates back to 1993. In *R. v. Parks*[1], the Court of Appeal for Ontario heard an appeal of a conviction for manslaughter of an accused Black man. Although there was no suggestion that the crime was racially motivated, in a noteworthy discussion, the Court of Appeal took judicial notice of anti-Black racism and how such racism pervades modern society:

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A

much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.[2]

Since then, Canadian courts and tribunals have grappled with the existence of prejudice toward racialized groups and, in particular, the Black community.[3] In the human rights context, adjudicators have accepted that, given the difficulties in marshalling evidence of such subtle and pervasive prejudice, anti-Black racism may often be established on the basis of circumstantial evidence.

Today, a focused effort is necessary to truly foster workplace equality. If unconscious prejudice is so widespread and entrenched in Canada's social psyche, the fight against anti-Black racism will require Canadians to roll up their sleeves, examine unconscious attitudes, and actively work on changing the structures of institutions and organizations.

Building an Effective Anti-Discrimination Strategy in Your Organization

To effectively combat workplace discrimination in all of its forms, employers need to implement customized and robust anti-discrimination strategies. The mere implementation of standardized and generic policies is no longer sufficient in build workplace diversity and equality. Responsibility must be shared and continually acted upon by all stakeholders in your organization, not just by members of statutorily-protected groups, in order for genuine workplace equality to be achieved.

At a minimum, three key components – or what I like to call the “Three Es”: **education, engagement, and empowerment** – are necessary for any effective strategy to combat workplace discrimination. Each component of your anti-discrimination strategy should be comprised of specific actionable and measurable tasks.

(a) EDUCATE: Understand the attitudes and structures that underlie your organization

Before you can implement initiatives to prevent racial discrimination, you first need to understand how race-related attitudes impact your workplace. At the outset, an effective anti-discrimination strategy should have measures for examining and learning about the attitudes and structures that ground your organization and the people within it. These measures may include:

- Implementing mandatory training initiatives that educate your managers and employees about unconscious bias and cultural competence, as well as how unconscious biases may create systemic barriers or impact perceptions of an employee's 'fit' or job performance;
- Analyzing the policies, power structures, and decision-making processes that exist in your workplace for elements that may be excluding or working against racialized groups, and identifying ways of correcting these elements. For example, this could involve redesigning your recruitment

processes to ensure that, to the maximum possible extent, candidates are evaluated on only objective criteria;

- Encouraging your managers and employees to attend industry events and continuing professional education sessions that speak to workplace diversity and inclusion; and
- Reviewing your progress to see whether your organization's diversity initiatives producing results and, if not, what needs to be changed.

(b) ENGAGE: Seek out and listen to your team members' perspectives

Make workplace equality a priority within your organization by creating an environment where employees feel comfortable discussing issues or concerns. If individuals can develop prejudices through how they are socialized and the conversations in which they participate, then these same individuals can unlearn prejudices through socialization and dialogue. To that end, engage your employees in discussions regarding workplace diversity. For example:

- Gather your employees' input when leading your team or making operational decisions, as this may raise awareness of different perspectives or reveal ways in which business decisions may be adversely impacting certain groups;
- Survey your employees, through a confidential questionnaire, about their experiences within the workplace;
- Implement a procedure by which employees can report complaints of workplace discrimination and encouraging your employees to raise such complaints; and
- Encourage employees to submit recommendations to management about ideas for strengthening workplace equality.

(c) EMPOWER: Foster the development and well-being of every employee

Establish programs and management structures that support every member of your workforce, especially those who identify as members of historically-disadvantaged groups. An effective anti-discrimination strategy should give all employees the tools that they need to thrive in the workplace, in terms of both job performance and overall well-being. The following are illustrative empowerment initiatives:

- Hold educational seminars and training aimed at equalizing the job-related skillset of your employees. For instance, seminars relating to presentation skills could neutralize any perceived imbalances in skill that arise from language-related issues (e.g. learning English as a second language, cultural differences in communication, etc.);
- Connect with networks or industry groups that provide professional resources or enhance the professional networks of employees who belong to historically-disadvantaged groups;
- Create a Diversity Committee whose portfolio is focused on the continual improvement of workplace equality and the addressing of inclusion-related issues in your organization; and
- Implement a procedure for investigating and resolving any complaints or incidents of workplace discrimination.

Through real, practical, and collective action, employers successfully build diverse workplaces. The path to workplace equality is now clear. Canadian employers must take steps that educate, engage, and empower the full potentials of all employees in their workplace.

[1] (1993), 15 O.R. (3d) 324 (C.A.).

[2] *Ibid* at pp. 24-25.

[3] See, for example, *Mitchell v. Ontario Property Management Group*, 2016 HRTO 1676; *Gichuru v. Law Society of British Columbia* (No. 7), 2010 BCHRT 252; and *R. v. Spence*, 2005 SCC 71.

About the Writer

Cassandra Ma practices labour and employment law with Fillion Wakely Thorup Angeletti LLP. She advises private and public sector employers on all types of workplace human resource issues, with a particular emphasis on disability management, grievance arbitrations, human rights, and workers' compensation law. She is a tenacious advocate who regularly represents employers before the courts (including the Court of Appeal for Ontario and the Ontario Superior Court of Justice), labour arbitrators, and employment-related administrative tribunals.

Cassandra is an active member of the legal community and a strong supporter of legal education initiatives. She frequently speaks and writes on labour and employment law issues, such as through contributions to international textbooks on labour and employment law. Among other associations, she is a proud member of the Canadian Association of Counsel to Employers' Human Rights Committee and the Federation of Asian Canadian Lawyers. Cassandra is heavily involved in the Ontario Bar Association, and currently is the Vice Chair for the Workers' Compensation Section Executive.